

Message Text

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ACTION TRSE-00

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P R 201545Z MAR 78
FM AMEMBASSY COPENHAGEN
TO SECSTATE WASHDC PRIORITY 6185
INFO AMEMBASSY BRUSSELS
AMEMBASSY LONDON
AMEMBASSY OSLO
AMEMBASSY PARIS
AMEMBASSY STOCKHOLM

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USEEC

USOECD

EO 11652: N/A
TAGS: EFIN, DA
SUBJ: DANISH TAXATION OF MULTINATIONAL CORPORATIONS

REF: (A) STATE 58680 (NOTAL), (B) COPENHAGEN 853

SUMMARY: ON THE BASIS OF INFORMATION COLLECTED TO DATE,
WE BELIEVE THAT IT WOULD BE PREMATURE FOR THE U.S.
GOVERNMENT TO BRING THE CASE INVOLVING FOREIGN MULTINATIONAL
OIL COMPANIES IN DENMARK (REF A) BEFORE THE OECD COMMITTEE
ON INTERNATIONAL INVESTMENT AND MULTINATIONAL ENTERPRISES
(CIME). WE RECOMMEND A DELAY, NOT ONLY TO GIVE US TIME
TO COLLECT MORE INFORMATION, BUT TO SEE HOW THE CASE WILL
EVOLVE. AT LEAST ONE OF THE FOUR COMPANIES IS CONFIDENT
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THAT THE TAX AUTHORITIES' INITIATIVE WILL BE SHOT DOWN
EITHER BY AN ADMINISTRATIVE OR JUDICIAL COURT.
END SUMMARY.

1. RE STATE 58680, WE BELIEVE THAT IT WOULD BE PREMATURE,
AND PERHAPS ILL-FOUNDED, TO RAISE IN CIME (OECD) THE RECENT
DANISH TAXATION ACTION WITH RESPECT TO FOUR MULTINATIONAL

OIL COMPANIES. OUR REASONING IS AS FOLLOWS:

A. THE ASSUMPTION OF REF A THAT THE ACTION OF THE DANISH TAX ASSESSMENT BOARD IS AIMED EXPLICITLY AT FOREIGN-CONTROLLED OIL FIRMS IS QUESTIONABLE. IN THE FIRST PLACE, THE ACTION INVOLVES ONLY FOUR OF THE SEVEN MAJOR FOREIGN OIL FIRMS OPERATING IN DENMARK. SECOND, THE MINISTER FOR TAXATION HAS IN PUBLIC PRONOUNCEMENTS SUGGESTED THAT THESE ARE ONLY THE FIRST OF ALL KINDS OF MNE'S OPERATING IN DENMARK THAT WILL BE EXAMINED.

B. NEITHER THE TAX ACTION NOR TAX OFFICIALS' PRONOUNCEMENTS ABOUT IT HAVE MADE ANY MENTION OF TRANSFER PRICES. THE TAX ASSESSMENT COMMITTEE INFORMED ESSO-- AND PRESUMABLY THE OTHER THREE COMPANIES--THAT THE NEW ESTIMATE OF ITS TAXES WAS NOT BASED ON CRITICISM OF CONCRETE ITEMS, BUT WHAT HAS BEEN DECISIVE IS WHAT CAN BE CONSIDERED A REASONABLE PROFIT IN VIEW OF THE KIND AND EXTENT OF YOUR COMPANY'S ACTIVITIES. THE ESTIMATE HAS BEEN BASED ON A COMPARISON WITH ACCOUNTING RESULTS OBTAINED BY DANISH SUBSIDIARY COMPANIES OF OTHER MULTINATIONAL COMPANIES."

C. IT IS STILL NOT CLEAR TO US HOW OR WHETHER DANISH MULTINATIONAL COMPANIES ARE AFFECTED (SEE PARA 2.D. BELOW).

D. AT LEAST ONE OF THE COMPANIES INVOLVED (ESSO) DOES NOT WANT ANY U.S. GOVERNMENT INTERVENTION AT THIS TIME. ESSO REASONS THAT THE TAX AUTHORITIES DO NOT HAVE A GOOD CASE AND THAT THEIR INITIATIVE WILL BE SHOT DOWN AT SOME STAGE OF THE ADMINISTRATIVE AND JUDICIAL APPEAL PROCESS. ESSO BELIEVES THAT IF PRESSURE IS PUT ON THE DANISH GOVERNMENT NOW, THROUGH OECD OR ELSEWHERE, THE DANISH GOVERNMENT MIGHT WITHDRAW THE INITIATIVE WITHOUT A CLEAR EXONERATION.

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TION OF THE COMPANIES INVOLVED. GIVEN ITS CONFIDENCE IN WINNING THE CASE, ESSO THEREFORE PREFERS TO PUSH IT TO ITS CONCLUSION AND THUS DIMINISH PUBLIC DOUBTS THAT THE COMPANY HAS SOMEHOW BEEN UNDERHANDLED WITH RESPECT TO ITS TAX RESPONSIBILITIES.

E. WHILE WE HAVE HAD THOROUGH-GOING CONVERSATIONS ON THE MATTER WITH ESSO, WE HAVE NOT YET BEEN ABLE TO EXPLORE THIS MATTER WITH THE OTHER AMERICAN COMPANIES INVOLVED. WE BELIEVE THAT IT WOULD BE USEFUL TO HAVE THEIR VIEWPOINTS AS WELL.

2. THE FOLLOWING ARE REPLIES TO SPECIFIC POINTS RAISED IN PARA 2 OF REF

A. PROVISIONS OF THE CORPORATION TAXATION ACT UNDER WHICH THE BOARD ACTED - TO BE FORWARDED BY AIRGRAM.

B. SPECIFIC DETAILS OF TAX ASSESSMENT BOARD DECISION - WHILE THE PRINCIPLE INVOLVED IS THE SAME FOR ALL FOUR COMPANIES, SPECIFIC ACTION WITH RESPECT TO TAXABLE INCOME IS DIFFERENT IN EACH CASE. ESSO HAS IN CONFIDENCE GIVEN US A COPY OF THE LETTER FROM THE ASSESSMENT BOARD. WE WILL TRY TO GET THE SAME FROM THE OTHER TWO AMERICAN COMPANIES AND FORWARD THEM VIA AIRGRAM.

C. THE RIGHT OF THE COMPANIES ADMINISTRATIVELY OR JUDICIALLY TO CHALLENGE THE TAX BOARD DECISION RE THEIR USE OF TRANSFER PRICES - ESSO EMPHASIZED TO US THAT THERE HAS BEEN NO CHALLENGE RE THE

USE OF TRANSFER PRICES. AS NOTED ABOVE, THE LETTER FROM THE ASSESSMENT BOARD STATED THAT THE INCREASE (OF COMPANY'S TAXABLE INCOME) "HAS NOT BEEN BASED ON CRITICISM OF CONCRETE ITEMS, BUT WHAT HAS BEEN DECISIVE IS WHAT CAN BE CONSIDERED A REASONABLE PROFIT IN CONSIDERATION OF THE KIND AND EXTENT OF YOUR COMPANY'S ACTIVITIES." THERE IS NO QUESTION, HOWEVER, ABOUT THE RIGHT OF ESSO AND THE OTHER COMPANIES TO CHALLENGE THE ACTION OF THE ASSESSMENT BOARD. THE PROGRESSION, AS OUTLINED BY ESSO, IS FIRST A CHALLENGE IN AN ADMINISTRATIVE TAX COURT, WHOSE DECISION EITHER PARTY CAN APPEAL.

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THE NEXT STEP IS TO MOVE INTO THE JUDICIAL SYSTEM AT THE LEVEL KNOWN IN DENMARK AS THE "HIGH COURT." THE NEXT, AND FINAL, LEVEL IS THE SUPREME COURT.

D. APPLICATION OF "ARMS LENGTH" TAX PROVISIONS TO OTHER MULTINATIONALS, INCLUDING THOSE THAT ARE DANISH OWNED - IN RADIO AND TELEVISION INTERVIEWS THE MINISTER FOR TAXATION HAS INDICATED THAT THE LEGAL PROVISION BEING APPLIED TO THE FOUR OIL COMPANIES WILL BE APPLIED TO OTHER COMPANIES. THE INITIATIVE AGAINST THE OIL COMPANIES HAS THE EARMARKS OF BEING A TEST CASE. THEIR BEING THE FIRST TARGETS STEMS FROM THE FACT THAT THEY HAVE IN RECENT YEARS PAID LOW OR NO TAXES AND WERE THE OBJECT OF PUBLIC POLITICAL SCRUTINY. AS FOR THE APPLICATION OF THE "ARMS LENGTH" PRINCIPLE TO DANISH-OWNED MULTINATIONALS, IT IS STILL NOT CLEAR TO US HOW OR WHETHER THE PRESENT COURSE OF ACTION WILL AFFECT DANISH

MULTINATIONAL COMPANIES OR WHETHER THE DANISH TAX AUTHORITIES ARE CONVINCED THAT THESE ARE ALREADY CONTROLLED BY EXISTING PRACTICES. WHILE THE SECTION IN THE LAW REFERRED TO MENTIONS ONLY FOREIGN COMPANIES, THE "ARM'S LENGTH" PRINCIPLE IS A COMMON FEALIMITED OFFICIAL USE

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TURE IN THE NUMEROUS BILATERAL DOUBLE TAXATION AGREEMENTS SIGNED BY DENMARK UNDER GENERAL LEGISLATIVE AUTHORITY. SPECIFIC LEGAL AUTHORITY TO IMPLEMENT INDIVIDUAL CLAUSES OF THESE AGREEMENTS PRESUMABLY WOULD NOT BE NECESSARY, THEREFORE, AND THE TAX CONTROL LEGISLATION PROVIDES AUTHORITIES FULL ACCESS TO DOCUMENTED ACCOUNTS OF DANISH COMPANIES. ACTUAL PRACTICES HAVE PROBABLY BEEN LAID DOWN IN ADMINISTRATIVE CIRCULARS AND INDIVIDUAL RULINGS BUT IT WILL BE DIFFICULT FOR US TO ASCERTAIN THIS WITHOUT APPROACHING DANISH TAX AUTHORITIES.

E. THE SOCIAL DEMOCRATIC PARTY'S GENERAL ATTITUDES TOWARD FOREIGN MULTINATIONALS - THE ATTITUDES OF THE PARTY ARE NOT UNIFORM. AMONG THOSE IN THE GOVERNMENT WHO ARE LESS SYMPATHETIC TOWARD MNE'S ARE THE MINISTERS OF COMMERCE (NORGAARD) AND TAXATION (KAMPMANN). THE MAJORITY IN THE GOVERNMENT, HOWEVER, INCLUDING THE PRIME MINISTER, RECOGNIZE THE USEFULNESS OF MNE'S, ALTHOUGH THEY MAY AT TIMES HARBOR SUSPICIONS REGARDING THEM (E. G., AS DURING THE 1974/75 OIL CRISIS). THIS SAME SORT OF DIFFERENCE OF ATTITUDE ALSO CHARACTERIZES THE PARTY'S PARLIAMENTARY DELEGATION. WHILE THE ATTITUDES OF THE SOCIAL DEMOCRATS ARE IMPORTANT, IT SHOULD ALSO BE REMEMBERED THAT THEIR GOVERNMENT IS A MINORITY ONE. NO MATTER WHAT SOCIAL DEMOCRATS' OWN ATTITUDES ARE, THEY MUST BE MINDFUL OF WHAT THE PARTIES TO THE RIGHT OF THEM ARE THINKING AS WELL. F. SIZE, NATIONALITY, MARKET SHARES OF INDEPENDENT OIL COMPANIES AND THE FOUR FIRMS AFFECTED BY THE DECISION - THIS INFORMATION WILL BE FORWARDED BY AIRGRAM.

G. HOW SERIOUSLY THE FIRMS TAKE THE DECISION - ACCORDING TO ESSO THE FOUR FIRMS TAKE THE DECISION SERIOUSLY AND INTEND TO CONTEST IT VIGOROUSLY. ESSO IS PREPARED TO CARRY THE APPEAL AS FAR AS THE SUPREME COURT IF NECESSARY. (OUR IMPRESSION IS THAT CHEVRON, TEXACO, AND BP WILL DO THE SAME. WE WILL BE TALKING WITH CHEVRON AND TEXACO FURTHER ABOUT THE MATTER.) ESSO ESTIMATED THAT LEGAL ACTION COULD COST THEM AROUND \$50,000, DEPENDING ON HOW LONG THE PROCESS GOES ON. ESSO DEFINITELY DOES NOT REPEAT NOT WANT ASSISLIMITED OFFICIAL USE

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TANCE FROM THE U.S. GOVERNMENT AT THIS TIME, EITHER BILATERALLY WITH THE DANISH GOVERNMENT OR MULTILATERALLY THROUGH OECD OR OTHER FORA.

H. ATTITUDES OF FOREIGN AND DANISH BUSINESS COMMUNITIES - WHILE NOT UNDULY ALARMED, IT IS SAFE TO SAY THAT BOTH OF THESE

COMMUNITIES ARE DISTURBED AND WILL CLOSELY WATCH THE DEVELOPMENT OF THE CASE. THE GOVERNMENT ITSELF WILL UNDOUBTEDLY BE ON THE ALERT FOR EVIDENCE THAT CASE IS HAVING AN ADVERSE AFFECT ON THE DANISH INVESTMENT CLIMATE.

I. PAST PROBLEMS BETWEEN FOREIGN FIRMS AND DANISH TAX AUTHORITIES. NEITHER WE NOR ESSO WAS AWARE OF ANY MAJOR PROBLEMS OF THIS TYPE. ESSO INDICATED THAT IT HAD IN THE PAST SOME DISCUSSIONS OF A TECHNICAL NATURE WITH THE AUTHORITIES REGARDING TAXES, BUT THESE OCCASIONS WERE NOT RELATED TO ESSO'S "FOREIGNNESS".

J. ESTIMATE OF HOW CASE WILL EVOLVE - THE CASE COULD END IN A FEW MONTHS OR DRAG ON FOR TWO OR MORE YEARS. ESSO BELIEVES THAT THE GOVERNMENT IS INTERESTED IN MOVING THE CASE ALONG AS RAPIDLY AS POSSIBLE. IT CAN USE ITS INFLUENCE TO MOVE THE CASE TO THE HEAD OF THE LINE IN THE ADMINISTRATIVE TAX COURT TO WHICH THE COMPANIES WILL FIRST APPEAL. THE CASE WILL END THERE IF THE COMPANIES GET A FAVORABLE RULING WHICH THE GOVERNMENT DOES NOT APPEAL. IF THE RULING IS UNFAVORABLE, THE COMPANIES WILL APPEAL. IF EITHER SIDE APPEALS, THE CASE GOES INTO THE JUDICIAL SYSTEM. HERE, ESSO SAYS, THE GOVERNMENT DOES NOT HAVE THE POSSIBILITY OF MOVING THE CASE TO THE TOP OF THE DOCKET AND THAT THE CASE WILL HAVE TO WAIT ITS TURN IN WHAT IS ALREADY A CROWDED SCHEDULE. THAT WOULD BE TRUE FOR BOTH THE HIGH COURT AND THE SUPREME COURT.

3. THE TRANSLATIONS OF PUBLIC STATEMENTS REQUESTED IN PARA 2. OF REF (A) WILL BE FORWARDED BY AIRGRAM.
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